INDEX

Page

Motion

Interest of the AFL-CIO iv
Issue Not Covered in the Petition v
Conclusion v

Brief

Reasons for Granting the Writ 2
Conclusion 7

Citations

CASES:

Republic Steel Corp. v. *Maddox*, 379 U.S. 650 (1965). 2
Simmons v. *Union News Co.*, 381 U.S. 884 (1965) .. 2
United Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) 7

MISCELLANEOUS:

Alexander: *Impartial Umpireships: General Motors —UAW:* in ARBITRATION AND THE LAW: PROCEEDINGS, 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 108 (1959) 3
Blumrosen: *Legal Protection for Critical Job Interests: Union Management Authority versus Employee Autonomy*, 13 Rutgers L. Rev. 631 (1959) . 2

Page

2 Bureau of National Affairs, Collective Bargaining Negotiations and Contracts, 51: 6-7 (1965) iv

Cox: *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956) 2

Cox: *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957) 2

61 LRRM 242 (Report of Remarks of Joseph Murphy, April 25, 1966) 5-6

Ross: *Distressed Grievance Procedures and their Rehabilitation*, in Labor Arbitration and Industrial Change, Proceedings, 16th Annual Meeting, National Academy of Arbitrators, 104 (1963) 3

Summers: *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362 (1962) 2

United States Supreme Court Rule 42 iii

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 1267

MANUEL VACA, CALEB MOONEY, AND ERNEST F. KOBETT,
Petitioner

v.

NILES SIPES, Administrator of the Estate of BENJAMIN OWENS, JR., Deceased.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of the petition for a writ of certiorari, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the petitioner has been obtained. Counsel for respondent has refused his consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and thirty-one affiliated labor organizations with a total membership of approximately thirteen million. The instant case involves a relatively small union which is not affiliated with the AFL-CIO. The questions presented, however, are of great importance to the institution of collective bargaining, and consequently to all unions.

Briefly stated, they are: What recourse does an employee have if his exclusive collective bargaining representative refuses to process his grievance through all of the available steps of a grievance and arbitration procedure established in the applicable collective bargaining agreement? May the employee bring a suit in court, or does his exclusive remedy lie before the National Labor Relations Board? In either case, what showing must the employee make in order to obtain relief? Finally, if he makes out a cause of action, what type of relief should be afforded?

More than 90 percent of all collective bargaining agreements in the United States provide a grievance and arbitration procedure similar to the one involved in the instant case, 2 BUREAU OF NATIONAL AFFAIRS, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, 51:6-7 (1965). Indeed, one of the principal functions of a union during the periods when such an agreement is in effect is to process the grievances that arise. The AFL-CIO, as spokesman for the majority of American unions and their members, therefore has a profound interest in the outcome of this case. For this reason it seeks leave to file a brief *amicus curiae*, in order to present the views of the labor movement as a whole as to why the petition for a writ of certiorari should be granted.

ISSUE NOT COVERED IN THE PETITION

We agree with petitioner (Pet. 22-23) that it is reasonable to anticipate that the main effect of the decision of the court below would be to force unions to press to arbitration nearly every grievance. This would work a radical change in the prevailing method of administering grievance and arbitration procedures and might well destroy this system for the peaceful settlement of industrial disputes. (Pet. 19) For this reason the accompanying brief *amicus curiae* is primarily devoted to an elaboration, including some statistics, of petitioner's brief reference to the present practice and the reasons that favor its retention.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying brief *amicus curiae* in the instant case in support of the petition for a writ of certiorari to the Supreme Court of the State of Missouri.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Thomas E. Harris
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D. C. 20006

May, 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 1267

MANUEL VACA, CALEB MOONEY, AND ERNEST F. KOBETT
Petitioner

v.

NILES SIPES, Administrator of the Estate of
BENJAMIN OWENS, JR., Deceased.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinions below, jurisdiction, questions presented, and the constitutional and statutory provisions involved are set out on pages 1-3, 25-27 of the petition.

The interest of the AFL-CIO is set out on page iv of the foregoing motion for leave to file a brief as *amicus curiae*.

REASONS FOR GRANTING THE WRIT

Despite the fact that it has been the continuing object of study by responsible commentators, and of continuing litigation in the lower courts, this Court has yet to address itself to the difficult and significant primary question squarely presented in the petition here—the exact scope and nature of the recourse open to an employee when his exclusive bargaining representative refuses to process his grievance past a certain step in the grievance and arbitration procedure provided for in the applicable collective bargaining agreement, see, *e.g.*, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965); *Simmons* v. *Union News Co.*, 381 U.S. 884 (1965). As the petition indicates (Pet. 15-16, 20-22), the decisions of the lower courts are in hopeless disarray as to every aspect of this problem. The same may fairly be said of the pertinent scholarly literature. See, e.g., Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956); Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957); Blumrosen, *Legal Protection for Critical Job Interests: Union Management Authority versus Employee Autonomy*, 13 Rutgers L. Rev. 631 (1959), Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. Rev. 362 (1962). The present case offers this Court an excellent opportunity to clarify this important area of the law. We believe that such clarification is essential.

1. The basic position of the AFL-CIO is that the requirements for a well functioning grievance and arbitration

procedure, upon which the success of the federal labor policy of encouraging the peaceful settlement of disputes depends, dictate that a large measure of reasonable discretion be allowed unions in determining which grievances to settle and which to press to arbitration.

Claims by employees that the employer has taken some action which violates the applicable collective bargaining agreement arise daily. Their resolution through contractual procedures, terminating in arbitration, similar to those provided in the agreement involved in the instant case, is normally the union's principal collective bargaining function during the contract term. At the present time, both companies and unions act on the theory that each of the parties to the agreement has an obligation to screen out grievances by settling them in the lower steps of the procedure. It is understood, in other words, that there must be a willingness to reach a meeting of the minds, rather than to remain firm on each grievance. The employer must be willing to grant grievances which appear to have merit, and the union must be willing to withdraw those which appear to lack merit. In at least one case this obligation has caused both parties to set up formal internal screening procedures, see Alexander, *Impartial Umpireships: General Motors.—UAW;* in ARBITRATION AND THE LAW: PROCEEDINGS, 12TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 108, 128-129 (1959). Moreover, as a reflection of this understanding, any grievance procedure in which a substantial portion of the grievances filed are taken to arbitration is regarded as a failure, a "distressed" situation requiring remedial action. See the discussions by the present Director of the Bureau of Labor Statistics, Arthur M. Ross, in Ross, *Distressed Grievance Procedures and their Rehabilitation,* in LABOR ARBITRATION AND INDUSTRIAL CHANGE, PROCEEDINGS, 16TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 104, 107 (1963), where it is noted that the most frequent cause of such distressed procedures

is the "refusal of international and local union officers to screen out the grievances . . . ."

To illustrate how the grievance and arbitration procedure works pursuant to current practices, the AFL-CIO has obtained from its two largest affiliates, the United Steelworkers of America and the United Automobile Workers, figures showing the number of grievances settled in the lower steps of the grievance and arbitration procedure provided for in the collective bargaining agreements between these unions and two employers, United States Steel Corporation (ore mines and basic steel operations) and General Motors Company.

The figures for General Motors are as follows:

Year 1959		
Written Grievances	89,408	
Settled[1]—Step One	53,984	61.0%
Settled—Step Two	25,631	28.9%
Settled—Step Three	8,863	10.0%
Settled—Umpire	35	0.04%
Year 1962		
Written Grievance	114,611	
Settled—Step One	72,999	66.0%
Settled—Step Two	26,694	24.1%
Settled—Step Three	10,841	9.8%
Settled—Umpire	33	0.03%

The figures for United States Steel are:

Years 1960-1965	
Grievances Processed Beyond First Step[2]	24,351
Settled—Step Two	38%
Settled—Step Three	21%

[1] "Settled" as used here refers to grievances which are granted, compromised or dropped.

[2] No record is kept of the number of grievances filed but settled in the first step.

Settled—Step Four	31%
Docketed for Arbitration	10%
Settled—Arbitration	5.6%

These figures show not only that most grievances are in fact settled in the lower steps, but more importantly that, because of the sheer volume of grievances involved, the procedure could not possibly operate effectively if the parties refused to settle the vast majority of grievances short of arbitration. This point is especially clear once it is realized that in most cases the agreement provides that the employees must, without protest, accept, and work under, the employer's decision until he agrees to reverse it or is ordered to do so by the arbitrator. At the present time the inevitable delays which occur when a case goes through all the grievance steps, and which must be anticipated in even the most efficient administrative system, are not regarded as an insupportable burden because it is realized that prolonged proceedings are the exception rather than the rule. This, of course, would no longer be true if most grievances were processed to arbitration. Moreover, since the higher steps are normally more formal than the lower (Pet. 53-54), it can be anticipated that under any practice other than the present one the procedure would become clogged and that a grievance going to arbitration would take longer to decide than the same grievance would today.

There is already some indication that the confused state of the law as to the nature and scope of the union's legal obligation to employees in handling their grievances has resulted in an increasing reluctance on the part of some unions to settle grievances. Thus, a report of a speech by Joseph Murphy, Vice President of the American Arbitration Association, in the April 25, 1966 issue of the Labor Relations Reporter states:

> "Discipline cases continue to lead as far as types of disputes going to arbitration are concerned, Murphy said.

> In 1965, 28.1 percent of cases involved discipline. This represents little change from the 28 percent figure for 1964. However, Murphy observed that in the first three months of 1966, the figure was up to 39 percent. He called this 'shocking' and predicted that the figure will be reduced over the course of the year.
>
> "The high percentage for early 1966, Murphy said, may be attributable to pressure on unions to move to protect individual employee rights. In earlier years, he remarked, unions were victorious in discipline arbitrations in about 80 percent of cases. That figure is now reduced to 50 percent—*an indication that unions will take up any discharge rather than risk defending a suit by the discharged employee.*" 61 LRRM 242 (emphasis added).

We believe that this impact on the prevailing system of grievance settlement, which can only become more pronounced as a result of this decision of the court below, is so serious as to warrant review by this Court.

2. We have nothing to add at this time to petitioner's discussion of preemption or of the content of the governing federal standard (Pet. 2, 11-13) except to note that we agree that these questions are important and should be resolved by this Court. Assuming for the moment that there is a possibility that the Court might reach the third of the questions presented (Pet. 2), we do however, wish to briefly note what we believe to be a fundamental error, as to the proper remedy, made by the court below.

The employee's claim here is that the Company unilaterally violated the collective bargaining agreement and that the union's wrong was simply that it refused to press the matter to arbitration, thereby permitting the basic wrong to go uncorrected. Yet the employee was allowed to seek and recover damages from the Union. The Company, who on the employee's theory was the principal wrongdoer in this case, was not even joined as a party, and was not required in any way to share the Union's liability.

We believe that such a result is clearly unfair and that when an employee makes out a cause of action under the proper standard, and some relief is therefore warranted it should be limited to an order directing the union to take the grievance to arbitration, and perhaps directing the arbitrator to allow the employee to represent himself if necessary, and to apportion whatever liability is found between the company and the union. This would assure that the final judgment as to whether the agreement has in fact been violated would be made by an arbitrator, as the agreement itself contemplated, rather than by a court or a jury. *Cf United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 577-82 (1960). It would also assure that if a violation of the agreement is ultimately found, the remedy would be that provided in the agreement (reinstatement and back pay) rather than an award of damages, as in this case.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. ALBERT WOLL
General Counsel, AFL-CIO

ROBERT C. MAYER
LAURENCE GOLD
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N.W.
Washington, D. C. 20006

May, 1966